

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AXIALL CORPORATION and  
WESTLAKE CHEMICAL CORPORATION,

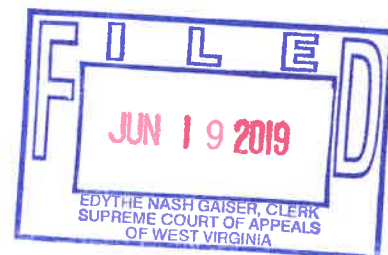
Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.; ALLIANZ  
GLOBAL RISKS US INSURANCE COMPANY;  
ACE AMERICAN INSURANCE COMPANY;  
ZURICH AMERICAN INSURANCE COMPANY;  
GREAT LAKES INSURANCE SE; XL  
INSURANCE AMERICA, INC.; GENERAL  
SECURITY INDEMNITY COMPANY OF  
ARIZONA; ASPEN INSURANCE UK LIMITED;  
NAVIGATORS MANAGEMENT  
COMPANY, INC.; IRONSHORE SPECIALTY  
INSURANCE COMPANY; VALIDUS  
SPECIALTY UNDERWRITING SERVICES,  
INC.; and HDI-GERLING AMERICA  
INSURANCE COMPANY

Defendants.

Marshall County Circuit Court  
Civil Action No. 19-C-59



**DEFENDANTS' MEMORANDUM IN RESPONSE TO  
JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Defendants, National Union Fire Insurance Company of Pittsburgh, Pa.; Allianz Global Risks US Insurance Company; ACE American Insurance Company; Zurich American Insurance Company; Great Lakes Insurance SE; XL Insurance America, Inc.; General Security Indemnity Company of Arizona; Aspen Insurance UK Limited; Navigators Management Company, Inc.; Ironshore Specialty Insurance Company; Validus Specialty Underwriting Services, Inc.; and HDI-Gerling America Insurance Company (collectively "Defendants"), by and through their counsel, submit this Memorandum in Response to Judicial Motion to Refer Case to the Business Court Division, stating as follows:

## I. PREFATORY STATEMENT

By Judicial Motion on May 30, 2019, Judge David W. Hummel, Jr. moved to refer this matter to the Business Court Division. *See* Exhibit “A,” May 30, 2019 Judicial Motion to Refer Case to the Business Court Division (“Motion to Refer”). As set forth in Defendants’ Answer and Defenses to Complaint, venue of this action in West Virginia is contested for a number of reasons, including the following:

- (1) The proper venue for this action is in the Delaware Superior Court, where Defendants initiated their first-filed and pending action, *National Union Fire Ins. Co. of Pittsburgh, Pa., et al. v. Axiall Corp. and Westlake Chemical Corp.*, C.A. No. N19C-04-089 EMD CCLD;<sup>1</sup>
- (2) Pursuant to W. VA. CODE § 56-1-1(c), Plaintiffs are not residents of West Virginia and the substantial part of the alleged acts or omissions giving rise to their claims did not occur in West Virginia;
- (3) The proper venue for this action is in the Delaware Superior Court, and this matter should therefore be dismissed based on the doctrines of comity and/or *forum non conveniens* as codified at W. VA. CODE § 56-1-1a; and
- (4) Alternatively, because the proper venue for this action is in the Delaware Superior Court, this action should be stayed pursuant to W. VA. CODE § 56-6-10.

Defendants will be submitting in the immediate future a motion to dismiss or stay and a memorandum in support of the same for the above-stated reasons. Without waiving any argument that West Virginia courts are not the proper venue for this dispute, Defendants respectfully submit this Memorandum in Response to Judicial Motion to Refer Case to the Business Court Division. Defendants expressly preserve the defense of improper venue under West Virginia Rule of Civil Procedure 12(b)(3).

## II. INTRODUCTION

---

<sup>1</sup> *See* Exhibit “B,” Complaint for Declaratory Judgment, *National Union Fire Ins. Co. of Pittsburgh, Pa., et al. v. Axiall Corp. and Westlake Chemical Corp.*, C.A. No. N19C-04-089 EMD CCLD (Del. Super. Ct. Apr. 9, 2019) (exhibits omitted).

As a general matter, Defendants do not oppose referring this matter to the Business Court Division as requested in Judge Hummel's Motion to Refer pursuant to Rule 29.06 of the West Virginia Trial Court Rules. However, the as-filed Motion to Refer also identifies two pending West Virginia actions involving Axiall Corporation ("Axiall"): *Covestro, LLC v. Axiall Corporation, et al.* (Civil Action No. 18-C-202) and *Axiall Corporation v. AllTranstek, LLC, et al.* (Civil Action No. 18-C-203) (the "Third-Party Liability Actions"). The Motion to Refer notes that these actions are related and "could be the subject of consolidation[.]" See Exhibit "A." The Motion to Refer states that the actions are related because "[t]his case will involve insurance coverage disputes over the related action currently pending in the Business Court." See Exhibit "A." However, the Policy of insurance at issue in this declaratory judgment action does not relate to the Third-Party Liability Actions or provide any third-party liability coverage to Plaintiffs. This action involves a first-party property insurance policy between Plaintiffs and Defendants. In other words, besides Axiall, none of the parties in the Third-Party Liability Actions are either parties to the Policy or beneficiaries under the Policy. Under the applicable standard set forth in West Virginia Rule of Civil Procedure 42(a) and as described below, consolidation of this matter and the Third-Party Liability Actions would be improper. In light of this, to the extent the Motion to Refer does seek to consolidate this matter and the Third-Party Liability Actions, Defendants oppose consolidation, and respectfully request that the Court decline to consolidate these cases.<sup>2</sup>

### **III. REQUEST TO DECLINE CONSOLIDATION**

On August 27, 2016, a fully-loaded railroad tank car at the plant ruptured and released approximately 178,400 pounds of liquefied chlorine (the "chlorine release"). The cause of the

---

<sup>2</sup> Since the Motion to Refer does not seek or recommend consolidation of the matters, but rather states that they "could be the subject of consolidation," Defendants have not provided comprehensive briefing in opposition to consolidation. However, upon request or direction by the Court, such briefing can be provided.

rupture that resulted in the chlorine release was faulty workmanship in certain repair work. Plaintiffs have alleged that the plant suffered corrosion and contamination damage as a result of the chlorine release, and submitted to Defendants claims related to the cost to remedy that alleged damage. Defendants are a subscribing quota share Market of insurers that issued 13 separate policies (collectively “Policy”<sup>3</sup>) of commercial first-party property insurance to Axiall, insuring its various properties throughout the United States, including the Natrium, Marshall County, West Virginia plant. The Policy insures Axiall for all risks of direct physical loss or damage to insured property, subject to certain terms, conditions, and exclusions, for the term of November 19, 2015 to November 19, 2016.

Defendants denied Plaintiffs’ submitted claims under the Policy based on the application of the Policy’s exclusions, specifically those exclusions for loss or damage caused by or resulting from corrosion, contamination, and/or faulty workmanship. This matter is related to the first-party property insurance coverage dispute between Plaintiffs and Defendants, their property insurers. Conversely, the Third-Party Liability Actions do not involve either Defendants or the Policy. Instead, they relate to the claims of Covestro, LLC<sup>4</sup> against Axiall and its maintenance and repair contractors for liability related to their work on the railroad tank car that ruptured, as well as similar

---

<sup>3</sup> “Policy” refers collectively to the following policies of insurance issued by Defendants on a quota share basis: National Union Fire Insurance Company of Pittsburgh, Pa. Nos. 020786808 (14.5%) and 27015349 (11.5%); Allianz Global Risks US Insurance Company No. CLP3016295 (12.5%); ACE American Insurance Company No. PGL N09175325 (12.5%); Zurich American Insurance Company No. OGR 8342756-19 (9.5%); Great Lakes Insurance SE No. B080110429J15 (8.5%); XL Insurance America, Inc. No. US00011825PR15A (7.5%); General Security Indemnity Company of Arizona No. 10F149909-2015-1 (7.5%); Aspen Insurance UK Limited No. OGADFE315 (5.0%); Navigators Management Company, Inc. No. 15NMNY1422-01 (3.0%); Ironshore Specialty Insurance Company No. 1843502 (3.0%); Validus Specialty Underwriting Services, Inc. No. AJC096910G15 (2.5%); and HDI-Gerling American Insurance Company No. XPD12642-02 (2.5%). These policies contain the same relevant terms, conditions, and exclusions, with one exception being that National Union Fire Insurance Company of Pittsburgh, Pa. Policy No. 020786808 contains an additional pollution and contamination endorsement.

<sup>4</sup> The owner of a downstream plant that was allegedly affected by the chlorine release.

claims by Axiall against its maintenance and repair contractors for liability related to their work on the railroad tank car. This action involves the interpretation of the terms, conditions, and exclusions of an insurance policy that does not relate to the Third-Party Liability Actions.

West Virginia Rule of Civil Procedure 42(a) governs the consolidation of actions pending before the same court:

- (a) Consolidation of Actions in Same Court.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. An action is pending before the court within the meaning of this subdivision if it is pending before the court on an appeal from a magistrate.

W. VA. R. CIV. P. 42 (2018).

This matter and the Third-Party Liability Actions do not involve common questions of law or fact as necessary for purposes of West Virginia Rule of Civil Procedure 42(a). Although the event which caused the loss or damage at issue in the actions is the same (the rupture of the railroad tank car and subsequent chlorine release), this matter and the Third-Party Liability Actions involve separate contracts and focus on different questions of fact and law. Specifically, the Third-Party Liability Actions center on the cause of the loss and liability therefore, while this matter involves the interpretation of a first-party insurance policy. In addition, the applicable law to this matter and the Third-Party Liability Actions is different, as the parties to this dispute agreed that “any dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia.” *See* Plaintiffs’ Complaint at ¶ 19. The outcome of the Third-Party Liability Actions have no bearing on whether the Policy covers Plaintiffs’ claim(s). Further, the Policy is not at issue in the Third-Party Liability Actions and, because it is a first-party property policy that only

reimburses its insureds for covered physical loss or damage caused to their insured property, it could not provide coverage for any potential liability in those actions.

Consolidation of this matter and the Third Party Liability Actions would cause confusion and prejudice as to Defendants' role relative to the unrelated parties involved in the Third-Party Liability Actions, place an undue burden on the parties to this matter to participate in a significant amount of irrelevant and unnecessary discovery that has no bearing on the Court's interpretation of the Policy, and would unnecessarily increase the length of time necessary to try and conclude this dispute, in contravention of West Virginia law. *See, e.g., State ex rel. Atkins v. Burnside*, 569 S.E.2d 150, 160 (W.V. 2002). Accordingly, because there is no common factual or legal question between this matter and the Third-Party Liability Actions, consolidation with those actions would be improper.

**WHEREFORE, PREMISES CONSIDERED,** Defendants state that they do not oppose Judge Hummel's Motion to Refer, but respectfully request that, to the extent the Motion to Refer seeks to consolidate this matter with the Third-Party Liability Actions, such consolidation be denied as it is improper under West Virginia law.

Respectfully submitted, this the 19th day of June, 2019.

**DEFENDANT INSURERS, By Counsel:**

Debra Tedeschi Varner (By CFS #13361)

James A. Varner, Sr. (WV State Bar #3853)

Debra Tedeschi Varner (WV State Bar #6501)

Varner & Van Volkenburg PLLC  
200 Peck Street, Suite 102 (26301)  
P. O. Box 2370  
Clarksburg, WV 26302-2370  
Telephone: (304) 918-2840  
Facsimile: (304) 566-1161

## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Axiall Corporation and  
Westlake Chemical Corporation,  
Plaintiff(s),

vs.

Marshall County Circuit Court  
Civil Action No. 19-C-59

National Union Fire Insurance Co. of  
Pittsburgh, Pa.,

Defendant.

TO: THE HONORABLE CHIEF JUSTICE

**JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Honorable David W. Hummel, Jr. respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

There are no known related actions.

**X The following related actions could be the subject of consolidation, and are**

**X now pending**

or

may be filed in the future. (Please list case style, number, and Court if any)

**Covestro v. Alltranstek, LLC et al. 18-C-202 (Marshall County)**

**Axiall Corporation v. Alltranstek, LLC et al. 18-C-203 (Marshall County)**

This action involves: (Please check all that apply)

**X Breach of Contract;**

Sale or Purchase of Commercial Entity;

Sale or Purchase of Commercial Real Estate;

Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code;

Terms of a Commercial Lease;

Commercial Non-consumer debts;

Internal Affairs of a Commercial Entity;

Trade Secrets and Trademark Infringement;

Non-compete Agreements;

Intellectual Property, Securities, Technology Disputes;

Commercial Torts;

(continued on next)

**X Insurance Coverage Disputes in Commercial Insurance Policies;**

Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity;

Anti-trust Actions between Commercial Entities;

Injunctive and Declaratory Relief Between Commercial Entities;

Liability of Shareholders, Directors, Officers, Partners, etc.;

Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;

Shareholders Derivative Claims;

Commercial Bank Transactions;

Franchisees/Franchisors;

Internet, Electronic Commerce and Biotechnology

**X Disputes involving Commercial Entities; or Other (Describe) \_\_\_\_\_**

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described here: The related case involves a dispute concerning a chlorine leak at the Axiall facility in Marshall County, West Virginia. This case will involve insurance coverage disputes over the related action currently pending in the Business Court.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint(s), the operative answer(s), the docket sheet.

In regard to expedited review, this Court:

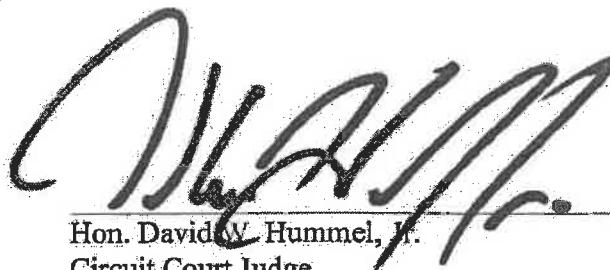
**X DOES NOT** request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.

hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so

**WHEREFORE**, the undersigned Judge hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.



Respectfully submitted, this May 29, 2019,



Hon. David W. Hummel, Jr.  
Circuit Court Judge  
600 Seventh Street  
Moundsville, WV 26041

CERTIFICATE OF SERVICE

I, David W. Hummel, Jr., do hereby certify that on this 29th day of May, 2019, I have served the foregoing "Judicial Motion to Refer Case to Business Court Division," with attachments by either hand delivery or first class mail to with attachments by either hand delivery or first class mail to all counsel of record; the Marshall County Circuit Clerk's Office; and the Business Court Division Central Office, Berkeley County Judicial Center, 380 West South Street, Suite 2100, Martinsburg, WV 25401.

  
Sender Signature

4 Copy Teste:

Joseph M. Rucki, Clerk

By Donna C. Rucki Deputy



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH, PA.;	)	
ALLIANZ GLOBAL RISKS US INSURANCE	)	
COMPANY; ACE AMERICAN INSURANCE	)	
COMPANY; ZURICH AMERICAN INSURANCE	)	
COMPANY; GREAT LAKES INSURANCE SE;	)	
XL INSURANCE AMERICA, INC.;	)	
GENERAL SECURITY INDEMNITY	)	
COMPANY OF ARIZONA;	)	
ASPEN INSURANCE UK LIMITED;	)	C.A. No. _____
NAVIGATORS MANAGEMENT	)	DECLARATORY
COMPANY, INC.; IRONSHORE SPECIALTY	)	JUDGMENT
INSURANCE COMPANY; VALIDUS	)	ACTION
SPECIALTY UNDERWRITING	)	
SERVICES, INC.; HDI-GERLING AMERICA	)	
INSURANCE COMPANY	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
AXIAL CORPORATION;	)	
WESTLAKE CHEMICAL CORPORATION	)	
	)	
Defendants.	)	

**COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiffs National Union Fire Insurance Company of Pittsburgh, Pa.; Allianz Global Risks US Insurance Company; ACE American Insurance Company; Zurich American Insurance Company; Great Lakes Insurance SE; XL Insurance America, Inc.; General Security Indemnity Company of Arizona; Aspen Insurance UK Limited; Navigators Management Company, Inc.; Ironshore

Specialty Insurance Company; Validus Specialty Underwriting Services, Inc.; and HDI-Gerling America Insurance Company (collectively “Insurers”) file this Complaint for Declaratory Judgment against Axiall Corporation and Westlake Chemical Corporation and would show the Court as follows:

### **I. NATURE OF ACTION**

1. This is a civil action by Insurers against Axiall Corporation (“Axiall”) and Westlake Chemical Corporation (“Westlake”) for a declaration of the rights, duties, and liabilities of the parties arising from the policies of insurance that each Insurer issued to Axiall on a quota share basis (collectively “Policy”).<sup>1</sup> Insurers are entitled to declaratory relief in accordance with DEL. CODE ANN. tit. 10, § 6501, and Rule 57 of the Delaware Superior Court Civil Rules.

### **II. THE PARTIES**

2. National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) is a domestic business entity organized and existing under the laws of the State of Pennsylvania with its principal place of business in New York. National

---

<sup>1</sup> “Policy” refers collectively to the following policies of insurance issued by Insurers on a quota share basis: National Union Nos. 020786808 and 27015349; Allianz No. CLP3016295; ACE No. PGL N09175325; Zurich No. OGR 8342756-19; Great Lakes No. B080110429J15; XL No. US00011825PR15A; GSINDA No. 10F149909-2015-1; Aspen No. OGADFE315; Navigators No. 15NMNY1422-01; Ironshore No. 1843502; Validus No. AJC096910G15; and HDI No. XPD12642-02.

Union was part of the subscribing quota share Market that issued the Policy to Axiall.

3. Allianz Global Risks US Insurance Company (“Allianz”) is a domestic business entity organized and existing under the laws of the State of Illinois with its principal place of business in Illinois. Allianz was part of the subscribing quota share Market that issued the Policy to Axiall.

4. ACE American Insurance Company (“ACE”) is a domestic business entity organized and existing under the laws of the State of Pennsylvania with its principal place of business in Pennsylvania. ACE was part of the subscribing quota share Market that issued the Policy to Axiall.

5. Zurich American Insurance Company (“Zurich”) is a domestic business entity organized and existing under the laws of the State of New York with its principal place of business in Illinois. Zurich was part of the subscribing quota share Market that issued the Policy to Axiall.

6. Great Lakes Insurance SE (f/k/a Great Lakes Reinsurance (UK) SE) (“Great Lakes”) is a foreign business entity organized and existing under the laws of Germany with its principal place of business in Munich. Great Lakes was part of the subscribing quota share Market that issued the Policy to Axiall.

7. XL Insurance America, Inc. (“XL”) is a domestic business entity organized and existing under the laws of the State of Delaware with its principal

place of business in Connecticut. XL was part of the subscribing quota share Market that issued the Policy to Axiall.

8. General Security Indemnity Company of Arizona (“GSINDA”) is a domestic business entity organized and existing under the laws of the State of Arizona with its principal place of business in New York. GSINDA was part of the subscribing quota share Market that issued the Policy to Axiall.

9. Aspen Insurance UK Limited (“Aspen”) is a foreign business entity organized and existing under the laws of England and Wales with its principal place of business in London. Aspen was part of the subscribing quota share Market that issued the Policy to Axiall.

10. Navigators Management Company, Inc. (“Navigators”) is an underwriting management company designated to underwrite policies on behalf of Certain Underwriters at Lloyd’s, London. Navigators is considered to be the service company coverholder under the Certificate of Insurance evidencing placement of insurance with Lloyd’s Syndicates 1221, 1897, and 4000 subscribing to Policy No. 15NMNY1422-01. Navigators is a domestic business entity organized and existing under the laws of the State of New York with its principal place of business in Connecticut. Navigators, on behalf of Lloyd’s Syndicates 1221, 1897, and 4000, was part of the subscribing quota share Market that issued the Policy to Axiall.

11. Ironshore Specialty Insurance Company (“Ironshore”) is a domestic business entity organized and existing under the laws of the State of Arizona with its principal place of business in Massachusetts. Ironshore was part of the subscribing quota share Market that issued the Policy to Axiall.

12. Validus Specialty Underwriting Services, Inc. (f/k/a Talbot Underwriting Services (US) Ltd.) (“Validus”) is a Managing General Agent designated to underwrite policies on behalf of Certain Underwriters at Lloyd’s, London. Validus is considered to be the service company coverholder under the Certificate of Insurance evidencing placement of insurance with Lloyd’s Syndicate 1183, subscribing to Policy No. AJC096910G15. Validus is a domestic business entity organized and existing under the laws of the State of Delaware with its principal place of business in New York. Validus, on behalf of Lloyd’s Syndicate 1183, was part of the subscribing quota share Market that issued the Policy to Axiall.

13. HDI-Gerling America Insurance Company (“HDI”) is a domestic business entity organized and existing under the laws of the State of Illinois with its principal place of business in Illinois. HDI was part of the subscribing quota share Market that issued the Policy to Axiall.

14. Axiall is the Named Assured under the Policy. Axiall is a corporation organized and existing under the laws of the State of Delaware with its principal

place of business in Texas.<sup>2</sup> Axiall's registered agent for service of process in Delaware is Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801.

15. Westlake acquired Axiall after the loss in approximately September 2016. Westlake is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Texas. Westlake's registered agent for service of process in Delaware is Corporation Trust Company, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801.

### **III. JURISDICTION, VENUE, & CHOICE OF LAW**

16. The Superior Court of Delaware has subject matter jurisdiction over this matter pursuant to DEL. CONST. art. 4, § 7 and DEL. CODE ANN. tit. 10, § 541 and § 6501 *et seq.*

17. This Court has personal jurisdiction over Axiall and Westlake, as they are business entities existing and incorporated under the laws of the State of Delaware.

18. Although the Delaware Superior Courts have no specific venue rules, venue is appropriate in New Castle County. Axiall, Westlake, XL, and Validus are

---

<sup>2</sup> At the time the Policy was issued, as well as at the time of the involved chlorine release incident, Axiall's principal place of business was in Georgia. After Westlake's purchase, the principal place of business was moved to Texas.

Delaware corporations with registered agents in Wilmington, New Castle County, Delaware.

19. Axiall and Insurers contractually agreed in the Policy that “[a]ny dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia. Any disputes between the Assured and [Insurers] over the terms of this Policy shall be subject to the United States of America jurisdiction.”<sup>3</sup> This broad choice of law agreement, as determined by the contracting parties at or prior to the time of Policy issuance, is fully enforceable. Accordingly, this Court should apply Georgia law to any dispute concerning or relating to the involved insurance, including, without limitation, the interpretation and application of all involved Policy provisions and any other related claims.

#### **IV. FACTUAL BACKGROUND**

##### **The Policy**

20. Insurers, as a subscribing quota share Market, issued 13 separate policies<sup>4</sup> of commercial property insurance to Axiall insuring its various properties, including the Natrium, Marshall County, West Virginia plant, as follows:

---

<sup>3</sup> Exhibit “A” at p. 31 of 65 (National Union Policy No. 020786808).

<sup>4</sup> These policies contain the same relevant terms, conditions, and exclusions, with one exception being that National Union Policy No. 020786808 contains an additional pollution and contamination endorsement as explained in ¶ 24 of this Complaint. With this one exception, National Union Policy No. 020786808 is representative of all the policies issued as part of the subscribing quota share Market.



## SECTION A – DECLARATIONS<sup>5</sup>

\*\*\*

### 5. Property and Interests Insured

All Real and Personal Property of every kind and description including but not limited to property of others in the care, custody or control of the Assured or for which the Assured may have assumed responsibility to insure, property of the Assured in the care, custody or control of others, Improvements and Betterments, Property whilst in the Course of Construction (including testing and commissioning) Vacant Locations, Personal Property of Employees, Valuable Papers, Mobile Equipment, Electronic Data Processing Equipment and Media (including cost of reproduction), Accounts Receivable, Demolition and Increased Cost of Construction, Time Element including Interdependencies, Business Interruption, Off Premises Power, Off Premises Services, Impounded Water, Contingent Business Interruption, Extra Expense, Contingent Extra Expense, Expediting Expenses and Rental Income/Value all including whilst in Transit and/or as more fully defined in this policy.

\*\*\*

21. The Policy insures Axiall for all risks of direct physical loss or damage to property insured, subject to the terms, conditions, and exclusions of the Policy, for the term of November 19, 2015 to November 19, 2016:

## SECTION B – REAL AND PERSONAL PROPERTY AND TIME ELEMENT<sup>6</sup>

### 1. Insuring Agreement

Subject to the terms, conditions and exclusions herein contained, this Policy insures, within the limits of liability set forth herein, the

---

<sup>5</sup> *Id.* at p. 2 of 65.

<sup>6</sup> *Id.* at p. 12 of 65.

property and interest as hereinafter set forth and defined against All Risks of Direct physical loss or damage occurring anywhere during the period of this Policy and including whilst in transit by any means within the territorial limits herein, except as hereinafter excluded.

\*\*\*

22. The Policy contains the following broad exclusions for corrosion and faulty workmanship:

**3. Perils Excluded<sup>7</sup>**

This policy does not insure against loss, damage or expense caused by or resulting from:

\*\*\*

- C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, but not excluding resultant physical loss or damage from a covered peril;
- D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship. This exclusion does not apply to resultant physical loss or damage not otherwise excluded;

\*\*\*

23. Endorsement No. 1 to the Policy excludes loss, damage, costs, and expenses in connection with any kind of Seepage and/or Pollution and/or Contamination, from any cause whatsoever:

---

<sup>7</sup> *Id.* at pp. 14-15 of 65.

**ENDORSEMENT NO.: #1<sup>8</sup>**

\*\*\*

**SEEPAGE AND/OR POLLUTION AND/OR  
CONTAMINATION EXCLUSION; DEBRIS REMOVAL AND  
COST OF CLEAN UP EXTENSION;  
AUTHORITIES EXCLUSION**

**SEEPAGE AND/OR POLLUTION AND/OR  
CONTAMINATION EXCLUSION**

Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.

Nevertheless if a peril not excluded from this Policy arises directly or indirectly from seepage and/or pollution and/or contamination any loss or damage insured under this Policy arising directly from that peril shall (subject to the terms, conditions and limitations of the Policy) be covered.

However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

The Named Assured shall give notice to this company of intent to claim NO LATER THAN 12 MONTHS AFTER THE DATE OF THE ORIGINAL PHYSICAL LOSS OR DAMAGE.

\*\*\*

All other terms, conditions and limitations remain unaltered.

---

<sup>8</sup> *Id.* at pp. 34-35 of 65.

\*\*\*

24. National Union issued two separate policies to Axiall as part of the subscribing quota share Market. National Union Policy No. 020786808 contains an additional Pollution, Contamination, and Debris Removal Exclusion:

**ENDORSEMENT NO.: #19<sup>9</sup>**

\*\*\*

**POLLUTION, CONTAMINATION, DEBRIS REMOVAL  
EXCLUSION ENDORSEMENT**

**1. Property Not Covered:**

This policy does not cover land, land values or water.

**2. Pollution and Contamination Exclusion.**

This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

Nevertheless, if fire is not excluded from this policy and a fire arises directly or indirectly from seepage or contamination or pollution, any loss or damage insured under this policy arising directly from that fire is insured, subject to the provisions of this policy.

CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability

---

<sup>9</sup> *Id.* at pp. 59-60 of 65.

or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

This exclusion shall not apply when loss or damage is directly caused by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm, hail, vandalism, malicious mischief. This exclusion shall also not apply when loss or damage is directly caused by leakage or accidental discharge from automatic fire protective systems.

\*\*\*

All other terms, conditions and exclusions of this policy remain unchanged.

\*\*\*

25. Endorsement No. 5 provides that the Policy does not insure asbestos or any sum relating thereto, except as follows:

**ENDORSEMENT NO.: #5<sup>10</sup>**

\*\*\*

**ASBESTOS EXCLUSION**

- A. This policy only insures asbestos physically incorporated in an insured building or structure, and then only that part of the asbestos which has been physically damaged during the policy period by one of these listed Perils:

Fire; Smoke; Explosion; Lightning; Windstorm; Hail;  
Direct impact of vehicle, aircraft or vessel; Riot or civil  
commotion; Vandalism or malicious mischief; or

---

<sup>10</sup> *Id.* at p. 40 of 65.

accidental discharge of fire protective equipment;  
collapse; falling objects, weight of snow, ice or sleet;  
Earthquake; Flood; Accident to an Object.

This coverage is subject to all limitations in the policy to which this endorsement is attached and, in addition, to each of the following specific limitations:

\*\*\*

2. The Listed Peril must be the immediate, sole cause of the damage to the [asbestos].

\*\*\*

- B. Except as set forth in the foregoing Section A., this policy does not insure asbestos or any sum relating thereto.

All other terms, conditions and limitations remain unaltered.

\*\*\*

### **The Loss and Investigation**

26. This matter involves a release of liquefied chlorine at Axiall's Natrium, Marshall County, West Virginia plant (the "Facility").

27. The Facility was constructed in 1943 and produces corrosive substances such as chlorine, caustic soda, hydrochloric acid, and calcium hypochlorite. One or more of these substances has been produced since the Facility originally began operations.

28. Axiall owned the Facility at the time the Policy was issued and at the time of the chlorine release. Upon information and belief, days later, Westlake closed on the acquisition of Axiall, effective on or about September 1, 2016.

29. On August 27, 2016, a fully-loaded tank car at the Facility experienced a 42-inch long crack in its tank shell, releasing approximately 178,400 pounds of liquefied chlorine (the “Loss”).

30. The Loss occurred approximately 20 minutes after the tank car was loaded for the first time after having been taken out of service for corrosion repairs and other maintenance work by third-party contractors in early-to-mid 2016. The repairs and maintenance work included work in the area where the crack formed.<sup>11</sup>

31. Upon release, the liquefied chlorine vaporized, resulting in a plume of chlorine vapor that travelled downwind through certain areas of the Facility.

32. Following the Loss, the Facility was shut down and the National Transportation Safety Board (“NTSB”) took control of the scene and began investigating the cause of the Loss. The NTSB removed the involved areas of the tank car for analysis, none of which has been made available by Axiall/Westlake to Insurers. The Facility, however, resumed operations less than 30 days after the Loss, and upon information and belief, has remained in operation since that time.

---

<sup>11</sup> See Exhibit “B,” Complaint filed by Axiall on August 24, 2018 in the Court of Common Pleas of Allegheny County, Pennsylvania, at ¶ 26.

33. Insurers were notified of the Loss on or about August 30, 2016, and an adjuster was appointed to begin an investigation. The adjuster retained Engineering Design & Testing Corp. to assist with the investigation and conduct a preliminary site visit of the Facility.

34. As noted above, Westlake acquired Axiall (and by extension the Facility) days after the Loss in September 2016. This reportedly resulted in delays on the part of Axiall/Westlake in providing information requested by the adjusters concerning the Loss.

35. Axiall/Westlake's appointed expert conducted very limited metallurgical testing in 2017. The results of that testing were shared with Insurers in July and December 2017. The test results only showed the presence of chlorides, which is not unexpected in a chlorine manufacturing facility, but there was no analysis conducted or provided to Insurers regarding the level of contamination or evidencing a causal connection between the presence of the chlorides and the Loss.

36. Insurers, through their appointed adjuster, issued a detailed and comprehensive reservation of rights letter to Axiall/Westlake on January 18, 2018. This letter identified, among other things, various provisions of the Policy for Axiall/Westlake's review, since such provisions were determined to likely impact coverage and the Policy response to any claim that may eventually be made by Axiall/Westlake under the Policy for the Loss.



37. After the initial test results were shared with the adjuster and the claim investigation began to develop, Insurers appointed additional technical consultants with appropriate expertise in order to properly analyze the impact, if any, of the chlorine release on the Facility and to assess the nature, type, and scope of any alleged damages to the Facility resulting from the Loss. This undertaking required specialized knowledge regarding metallurgy, chemistry, sampling and testing of surface deposits, dispersion analysis, electronics, and contamination. Axiall/Westlake was advised of the addition of these additional experts as the investigation continued.

38. On May 22, 2018, approximately 21 months after the Loss, Westlake, on behalf of Axiall, presented its first claim in the form of a sworn “partial proof of loss” in the amount of \$5,764,231. As presented, the claim consisted of costs to repair or replace property that was allegedly affected by the exposure to the chlorine release, including costs to store allegedly damaged parts, internal labor expenses, and engineering fees. Of the claimed costs, \$4,976,204 were purchase orders for, among other items, pipe lagging/banding (\$2,023,396), and electronics, electrical instruments, and equipment (approximately \$1,200,000). At such time, Westlake indicated that it would “continue to make additional submissions” “as additional amounts are incurred for repairs going forward.” Applying the Policy’s

\$3,750,000 property damage deductible,<sup>12</sup> the net interim claim as presented in the partial proof of loss was for approximately \$2,014,231.

39. On June 20, 2018, the adjuster, on behalf of Insurers, responded to this partial proof of loss, reiterating Insurers' reservation of rights under the Policy and explaining that additional time was necessary to complete the ongoing technical investigation and evaluation of the Loss and items being claimed. Axiall/Westlake was also advised of the involved coverage issues with respect to the Loss.

40. The adjuster issued letters to Axiall/Westlake on August 3, 2018, September 17, 2018, November 1, 2018, and December 14, 2018, providing regular updates regarding the status of the investigation, and explanations of the activities being undertaken and the involved coverage issues.

41. On December 10, 2018, Axiall/Westlake advised Insurers that it was in the process of preparing a supplement to its May 22, 2018 partial proof of loss, which it anticipated submitting in early 2019.

42. On January 28, 2019, subject to Insurers' ongoing reservation of rights, the adjuster conveyed Insurers' position that the type of damages alleged in the partial proof of loss were that of general chlorine contamination and/or corrosion, and the apparent direct result of faulty workmanship with respect to the

---

<sup>12</sup> See Exhibit "A" at p. 4 of 65.

faulty repairs performed by third parties on the involved tank car. As a result, Axiall/Westlake was advised that the claimed items are expressly excluded under the Policy. This letter invited Axiall/Westlake to respond in writing and to provide any authorities in support of its position that the claimed costs should be covered under the Policy. Axiall/Westlake did not provide a substantive response to Insurers' January 28, 2019 letter, and did not submit any of the requested supporting authorities.

43. With respect to the release, Axiall has filed two actions against the third-party contractors involved with the inspection, maintenance, and repair work performed on the tank car just prior to the release (AllTranstek LLC; Rescar, Inc., t/d/b/a Rescar Companies; and Superheat FGH Services, Inc.), claiming the following negligent acts and omissions in their work on the tank car caused the rupture:

- a) In failing to use ordinary care in the fulfillment of their work on or in connection with the railroad tank car;
- b) In failing to comply with the standard of care in the industry in performing their work on or in connection with the railroad tank car;
- c) In the case of Rescar, in failing to perform repair work with the minimal level of care required in order to prevent the railroad tank car's shell rupturing upon first post-repair use;
- d) In the case of AllTranstek, in failing to employ the reasonable care required to recognize that Rescar's repairs were faulty, and

that the railroad tank car was not fit for return to chlorine service; [and]

- e) In the case of Superheat, in failing to adhere to the standard of care required in monitoring heat treating during the course of railroad tank car repairs.<sup>13</sup>

44. Axiall/Westlake, in alleging the foregoing, has acknowledged that faulty work of third parties in failing to properly conduct post-weld heat treatment, among other things, caused the Loss.

45. On March 20, 2019, nearly 31 months after the Loss, Axiall/Westlake presented its second sworn proof of loss – this one in the amount of \$278,505,078 gross of the Policy’s \$3,750,000 property damage deductible. This amount consists of \$226,182,418<sup>14</sup> in estimated costs to repair or replace property allegedly affected by the exposure to the chlorine release, \$5,905,147<sup>15</sup> in costs actually incurred, and \$46,417,513 as a 20% discovery contingency. Axiall/Westlake stated that the total claim was for damages and expenses incurred “as of March 20, 2019.” Applying the Policy’s \$3,750,000 property damage deductible,<sup>16</sup> the net claim was for approximately \$274,755,078. The vast majority of the claim, as

---

<sup>13</sup> See Exhibit “B” at ¶ 57 and Exhibit “C,” Complaint filed by Axiall on August 24, 2018 in the Circuit Court of Marshall County, West Virginia at ¶ 55.

<sup>14</sup> Included in this figure is \$28,000,000 for conditions such as asbestos encountered in replacing lagging and banding.

<sup>15</sup> This figure appears to represent an additional \$140,916 incurred since the \$5,764,231 Axiall/Westlake claimed in the first partial proof of loss on May 22, 2018.

<sup>16</sup> See Exhibit “A” at p. 4 of 65.

presented in the most recent submission, lacks appropriate support that these costs have actually been incurred. It appears that of the gross \$278,505,078 claim, approximately \$272,000,000 has not yet been incurred (approximately 98% of the claim). The claim also lacks support to demonstrate that equipment in the claim was damaged as a result of the Loss and requires replacement.

46. On April 9, 2019, Insurers once again wrote to Axiall/Westlake reiterating the coverage positions and denial communicated to Axiall/Westlake in Insurers' prior letter of January 28, 2019.

47. Since the Loss, Axiall/Westlake has taken minimal steps to mitigate any potential or alleged corrosion or contamination arising from the Loss, such as cleaning any exposed or purportedly contaminated equipment. Upon information and belief, despite Axiall/Westlake's assertion that the chlorine release impacted a large portion of the Facility, the only mitigation work undertaken was to clean a single pipe at the Facility.

**COUNT I**  
**DECLARATORY JUDGMENT**  
**(Faulty Workmanship Exclusion)**

48. Insurers repeat and re-allege paragraphs 1 through 47 of this Complaint as if fully set forth herein.

49. An actual, substantive, and justiciable controversy exists between Axiall/Westlake and Insurers concerning the coverage under the Policy for the

claims submitted by Axiall/Westlake. Accordingly, the parties have a direct, substantial, and present interest in having the Policy construed and applied to the submitted claims.

50. Pursuant to the terms, conditions, and provisions of the Policy, which are incorporated herein by reference, Insurers are entitled to a declaration that:

- a. The Policy language regarding the exclusion for “[l]oss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship” is clear and unambiguous.<sup>17</sup>
- b. The Loss is excluded from coverage by the Policy’s exclusion of “[l]oss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship.”<sup>18</sup>
- c. No “physical loss or damage not otherwise excluded”<sup>19</sup> resulted from the Loss.
- d. Insurers have no obligations under the Policy or otherwise to provide any payment or indemnity to Axiall/Westlake, and Insurers have no further obligation to Axiall/Westlake arising from the Loss.

---

<sup>17</sup> *Id.* at p. 15 of 65.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

**COUNT II**  
**DECLARATORY JUDGMENT**  
**(Corrosion Exclusion)**

51. Insurers repeat and re-allege paragraphs 1 through 50 of this Complaint as if fully set forth herein.

52. An actual, substantive, and justiciable controversy exists between Axiall/Westlake and Insurers concerning the coverage under the Policy for the claims submitted by Axiall/Westlake. Accordingly, the parties have a direct, substantial, and present interest in having the Policy construed and applied to the submitted claims.

53. Pursuant to the terms, conditions, and provisions of the Policy, which are incorporated herein by reference, Insurers are entitled to a declaration that:

- a. The Policy language regarding the exclusion for “[l]oss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, but not excluding resultant physical loss or damage from a covered peril” is clear and unambiguous.<sup>20</sup>
- b. The cost to repair or replace property as a result of the alleged corrosion damage at the Facility is excluded by the Policy as “[l]oss or damage from wear and tear, rust, corrosion, erosion, depletion or

---

<sup>20</sup> *Id.*

gradual deterioration, but not excluding resultant physical loss or damage from a covered peril[.]”<sup>21</sup>

- c. No “physical loss or damage from a covered peril”<sup>22</sup> resulted from this Loss.
- d. Insurers have no obligations under the Policy or otherwise to provide any payment or indemnity to Axiall/Westlake, and Insurers have no further obligation to Axiall/Westlake arising from the Loss.

**COUNT III**  
**DECLARATORY JUDGMENT**  
**(Pollution/Contamination Exclusion – Endorsement No. 1)**

54. Insurers repeat and re-allege paragraphs 1 through 53 of this Complaint as if fully set forth herein.

55. An actual, substantive, and justiciable controversy exists between Axiall/Westlake and Insurers concerning the coverage under the Policy for the claims submitted by Axiall/Westlake. Accordingly, the parties have a direct, substantial, and present interest in having the Policy construed and applied to the submitted claims.

56. Pursuant to the terms, conditions, and provisions of the Policy, which are incorporated herein by reference, Insurers are entitled to a declaration that:

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



- a. The Policy language regarding the exclusion for “loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever” is clear and unambiguous.<sup>23</sup>
- b. The cost to repair or replace property as a result of contamination to the Facility is excluded from coverage by the Policy as “loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.”<sup>24</sup>
- c. No “peril not excluded from this Policy a[rose] directly or indirectly from seepage and/or pollution and/or contamination.”<sup>25</sup>
- d. No “direct physical loss or damage for which [Insurers] ha[ve] paid or agreed to pay” has occurred such that no “direct physical loss or damage to the property insured hereunder [was] caused by resulting seepage and/or pollution and/or contamination.”<sup>26</sup>
- e. Insurers have no obligations under the Policy or otherwise to provide any payment or indemnity to Axiall/Westlake, and Insurers have no further obligation to Axiall/Westlake arising from the Loss.

---

<sup>23</sup> *Id.* at p. 34 of 65.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

**COUNT IV**  
**DECLARATORY JUDGMENT**  
**(Pollution/Contamination Exclusion – Endorsement No. 19)**

57. Insurers repeat and re-allege paragraphs 1 through 56 of this Complaint as if fully set forth herein.

58. An actual, substantive, and justiciable controversy exists between Axiall/Westlake and National Union concerning the coverage under National Union Policy No. 020786808 for the claims submitted by Axiall/Westlake. Accordingly, the parties have a direct, substantial, and present interest in having the Policy construed and applied to the submitted claims.

59. Pursuant to the terms, conditions, and provisions of National Union Policy No. 020786808, National Union is further entitled to a declaration that:

- a. The language in Policy No. 020786808 regarding the exclusion of “loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy” is clear and unambiguous.<sup>27</sup>

---

<sup>27</sup> *Id.* at p. 59 of 65.

- b. The cost to repair or replace property as a result of chlorine contamination is also excluded from coverage by said policy as “loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.”<sup>28</sup>
- c. No “fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm, hail, vandalism, malicious mischief” resulted from the Loss.<sup>29</sup>
- d. No “loss or damage [was] directly caused by leakage or accidental discharge from automatic fire protective systems.”<sup>30</sup>
- e. Under Endorsement No. 19, National Union has no obligations under said policy or otherwise to provide any payment or indemnity to Axiall/Westlake, and National Union has no further obligation to Axiall/Westlake arising from the Loss.

**COUNT V**  
**DECLARATORY JUDGMENT**  
**(Asbestos Exclusion – Endorsement No. 5)**

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

60. Insurers repeat and re-allege paragraphs 1 through 59 of this Complaint as if fully set forth herein.

61. An actual, substantive, and justiciable controversy exists between Axiall/Westlake and Insurers concerning the coverage under the Policy for the claims submitted by Axiall/Westlake. Accordingly, the parties have a direct, substantial, and present interest in having the Policy construed and applied to the submitted claims.

62. Pursuant to the terms, conditions, and provisions of the Policy,<sup>31</sup> which are incorporated herein by reference, Insurers are entitled to a declaration that:

- a. The Policy language providing that the Policy “does not insure asbestos or any sum relating thereto” is clear and unambiguous.<sup>32</sup>
- b. Any costs or expenses related to asbestos are excluded from coverage by the Policy as “asbestos or any sum relating thereto.”
- c. No “Fire; Smoke; Explosion; Lightning; Windstorm; Hail; Direct impact of vehicle, aircraft or vessel; Riot or civil commotion; Vandalism or malicious mischief; or accidental discharge of fire protective equipment; collapse; falling objects, weight of snow, ice or

---

<sup>31</sup> Endorsement No. 19 to National Union Policy No. 020786808 also contains an asbestos exclusion that provides an additional, independent basis for excluding any costs or expenses related to the removal of asbestos under said policy.

<sup>32</sup> *Id.* at p. 40 of 65.

sleet; Earthquake; Flood; Accident to an Object” were the “immediate, sole cause” of any damage to asbestos.

- d. Insurers have no obligations under the Policy or otherwise to provide any payment or indemnity to Axiall/Westlake, and Insurers have no further obligation to Axiall/Westlake arising from the Loss.

**COUNT VI**  
**DECLARATORY JUDGMENT**  
**(Alternative Relief – Scope and Extent of Alleged Damage)**

63. Insurers repeat and re-allege paragraphs 1 through 62 of this Complaint as if fully set forth herein.

64. In the alternative, should the Court determine that Axiall/Westlake is entitled to coverage, in whole or in part, under the Policy, Insurers seek a declaration that Axiall/Westlake failed to demonstrate actual covered physical damage caused by the Loss, that it has failed to provide the technical basis demonstrating the extent to which corrosion or contamination are attributable to the Loss rather than to pre-existing conditions, and that it has failed to demonstrate or provide an appropriate technical basis and supporting documentation for its decision to replace equipment as a result of the Loss.

65. Insurers seek a declaration that Axiall/Westlake has failed to prove that it suffered any covered direct physical loss or damage as a result of the Loss.

**COUNT VII**  
**DECLARATORY JUDGMENT**

**(Alternative Relief – Failure to Mitigate Damages)**

66. Insurers repeat and re-allege paragraphs 1 through 65 of this Complaint as if fully set forth herein.

67. In the alternative, should the Court determine that Axiall/Westlake is entitled to coverage, in whole or in part, under the Policy and that the Facility suffered direct physical loss or damage as a result of the Loss, Insurers seek a declaration that Axiall/Westlake has failed, in whole or in part, to mitigate its damages as required by the following Policy provisions:

**SECTION C – GENERAL CONDITIONS**

\*\*\*

**7. Sue and Labor<sup>33</sup>**

In case of actual loss or damage it shall be lawful and necessary for the Assured, their factors, servants or assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance nor shall the acts of the Assured or this company in recovering, saving and preserving the property insured in case of loss or damage, be considered a Waiver or acceptance of an abandonment.

\*\*\*

**19. Due Diligence Clause<sup>34</sup>**

The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property herein insured.

---

<sup>33</sup> *Id.* at p. 27 of 65.

<sup>34</sup> *Id.* at p. 30 of 65.

\*\*\*

68. Insurers seek a declaration that Axiall/Westlake's recovery (if any) under the Policy should be properly reduced due to its failure to mitigate its damages as required by the Policy.

**COUNT VIII**  
**DECLARATORY JUDGMENT**  
**(Alternative Relief – Repair Limitation)**

69. Insurers repeat and re-allege paragraphs 1 through 68 of this Complaint as if fully set forth herein.

70. In the alternative, should the Court determine that Axiall/Westlake is entitled to coverage, in whole or in part, under the Policy and that the Facility suffered direct physical loss or damage as a result of the Loss, Insurers seek a declaration that for all items of alleged damage in which repairs or construction were not initiated within two years of the Loss as required by the following Policy provision, the measure or basis of recovery shall be Actual Cash Value:

**SECTION B – REAL AND PERSONAL PROPERTY AND  
TIME ELEMENT<sup>35</sup>**

\*\*\*

**4. Basis of Recovery**

The basis of recovery hereunder shall be as follows:

---

<sup>35</sup> *Id.* at p. 17 of 65.

\*\*\*

- (2) In the event of loss or damage to property which is not repaired, rebuilt or replaced, recovery will be on an Actual Cash Value basis. The repair, rebuild or replacement should be initiated (i.e., construction started, etc.) within two years from the date of loss.

\*\*\*

71. Insurers seek a declaration that to the extent Axiall/Westlake is entitled to coverage, in whole or in part, under the Policy, Axiall/Westlake is not entitled to recover any costs or expenses for the repair or replacement of any alleged damage at the Facility not initiated by August 27, 2018 (two years from the date of Loss).

**COUNT IX**  
**DECLARATORY JUDGMENT**  
**(Alternative Relief – Appraisal)**

72. Insurers repeat and re-allege paragraphs 1 through 71 of this Complaint as if fully set forth herein.

73. In the alternative, should the Court determine that Axiall/Westlake is entitled to coverage, in whole or in part, under the Policy and that the Facility suffered direct physical loss or damage as a result of the Loss, Insurers seek a declaration that the amount of loss must be determined in accordance with the following Policy provision:



## SECTION C – GENERAL CONDITIONS<sup>36</sup>

\*\*\*

### 11. Appraisal

In the event of disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the Assured and [Insurers] each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the value and damage, and failing to agree, shall submit their differences only to the umpire, and the agreement in writing of any two shall determine the amount of such loss, the parties shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and the umpire.

\*\*\*

74. Insurers seek a declaration that the amount of loss (if any) must be determined in accordance with Policy's appraisal provision.

### REQUEST FOR RELIEF

**WHEREFORE**, Insurers respectfully request judgment in their favor against Axiall/Westlake, and ask that the Court declare that:

- a. Insurers are entitled to judgment in their favor under Count I (Faulty Workmanship Exclusion), including a declaration of non-coverage under the Policy in accordance with Paragraph 50 of the Complaint, subparts a. through d.

---

<sup>36</sup> *Id.* at p. 28 of 65.

- b. Insurers are entitled to judgment in their favor under Count II (Corrosion Exclusion), including a declaration of non-coverage under the Policy in accordance with Paragraph 53 of the Complaint, subparts a. through d.
- c. Insurers are entitled to judgment in their favor under Count III (Pollution/Contamination Exclusion – Endorsement No. 1), including a declaration of non-coverage under the Policy in accordance with Paragraph 56 of the Complaint, subparts a. through e.
- d. National Union, under Policy No. 020786808, is entitled to judgment in its favor under Count IV (Pollution/Contamination Exclusion – Endorsement No. 19), including a declaration of non-coverage under said policy in accordance with Paragraph 59 of the Complaint, subparts a. through e.
- e. Insurers are entitled to judgment in their favor under Count V (Asbestos Exclusion – Endorsement No. 5), including a declaration of non-coverage under the Policy in accordance with Paragraph 62 of the Complaint, subparts a. through d. National Union, under Policy No. 020786808, is further entitled to judgment in its favor under Count V (Asbestos Exclusion – Endorsement No. 5), including a declaration of

non-coverage under said policy in accordance with Endorsement No. 19.

- f. In the alternative, Insurers are entitled to judgment in their favor under Count VI (Alternative Relief – Scope and Extent of Alleged Damage), including a declaration that Axiall/Westlake has failed to prove that it suffered any covered direct physical loss or damage as a result of the Loss in accordance with Paragraphs 64 and 65 of the Complaint.
- g. In the alternative, Insurers are entitled to judgment in their favor under Count VII (Alternative Relief – Failure to Mitigate Damages), including, in accordance with Paragraphs 67 and 68 of the Complaint, a declaration that Axiall/Westlake has failed, in whole or in part, to mitigate its damages as a result of the Loss, and those damages should be reduced accordingly.
- h. In the alternative, Insurers are entitled to judgment in their favor under Count VIII (Alternative Relief – Repair Limitation), including, in accordance with Paragraphs 70 and 71 of the Complaint, a declaration that for all items of alleged damage in which repairs or construction were not initiated within two years of the Loss, Axiall/Westlake may only recover Actual Cash Value, and those damages should be reduced accordingly.

- i. In the alternative, Insurers are entitled to judgment in their favor under Count IX (Alternative Relief – Appraisal), including, in accordance with Paragraphs 73 and 74 of the Complaint, a declaration that the amount of damages must be estimated and appraised by two competent and disinterested appraisers, with one chosen by Axiall/Westlake and one chosen by Insurers, and should the appraisers disagree as to the amount of damages, the disagreement shall be settled by a competent and disinterested umpire.

Insurers also ask for any further relief to which they are entitled, including an award of attorneys' fees and costs incurred in connection with this action, and any additional relief as may be just and proper. In the event this Court does not grant declaratory judgment in Insurers' favor, Insurers reserve their rights as to any other coverage issues that may exist regarding the claims made by Axiall/Westlake which have not been addressed herein.

This the 9<sup>th</sup> day of April, 2019.

Respectfully submitted,

By: /s/ Francis J. Murphy  
FRANCIS J. MURPHY, I.D. #223  
JONATHAN L. PARSHALL, I.D. #3247  
MURPHY & LANDON, P.A.  
1011 CENTRE ROAD, SUITE 210  
WILMINGTON, DELAWARE 19805  
fmurphy@msslaw.com

**ATTORNEY FOR PLAINTIFF INSURERS**

**OF COUNSEL:**

Myles A. Parker (MSB # 8746)  
Alexandra F. Markov (MSB # 100428)  
Justin M. Sumrall (MSB #105330)  
Ben C. Lewis (MSB #104499)  
CARROLL WARREN & PARKER PLLC  
One Jackson Place  
188 E. Capitol Street, Suite 1200  
Post Office Box 1005  
Jackson, Mississippi 39215-1005  
Phone: 601-592-1010  
Fax: 601-592-6060  
mparker@cwplaw.com  
amarkov@cwplaw.com  
jsumrall@cwplaw.com  
blewis@cwplaw.com

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

AXIAL CORPORATION and  
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.; ALLIANZ  
GLOBAL RISKS US INSURANCE COMPANY;  
ACE AMERICAN INSURANCE COMPANY;  
ZURICH AMERICAN INSURANCE COMPANY;  
GREAT LAKES INSURANCE SE; XL  
INSURANCE AMERICA, INC.; GENERAL  
SECURITY INDEMNITY COMPANY OF  
ARIZONA; ASPEN INSURANCE UK LIMITED;  
NAVIGATORS MANAGEMENT  
COMPANY, INC.; IRONSHORE SPECIALTY  
INSURANCE COMPANY; VALIDUS  
SPECIALTY UNDERWRITING SERVICES,  
INC.; and HDI-GERLING AMERICA  
INSURANCE COMPANY

Defendants.

Marshall County Circuit Court  
Civil Action No. 19-C-59

**CERTIFICATE OF SERVICE**

Service of the foregoing **DEFENDANTS' MEMORANDUM IN RESPONSE TO JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION** was had upon the parties, as set forth below, via facsimile and/or by mailing a true copy hereof, by United States Mail, postage prepaid, this 19th day of June, 2019:

Jeffrey V. Kessler, Esquire  
Berry, Kessler, Crutchfield, Taylor & Gordon  
514 Seventh Street  
Moundsville, WV 26041  
**Fax (304) 845-9055**  
*Counsel for Plaintiffs*

Travis L. Brannon, Esquire  
Sarah M. Czepinski, Esquire  
Paul C. Fuener, Esquire  
David R. Osipovich, Esquire  
Thomas C. Ryan, Esquire  
John M. Sylvester, Esquire  
K&L Gates LLP  
210 Sixth Avenue  
Pittsburgh, PA 15222  
**Fax (412) 355-6501**  
*Counsel for Plaintiffs*

Joseph M. Rucki, Clerk  
Circuit Court of Marshall County  
Marshall County Courthouse  
600 Seventh Street  
Moundsville, WV 26041  
***Fax (304) 845-3948***

Berkeley County Judicial Center  
Business Court Division  
380 West South Street, Suite 2100  
Martinsburg, WV 25401  
***Via U.S. Mail and***  
***Email: [business.court@courtswv.gov](mailto:business.court@courtswv.gov)***

Honorable David W. Hummel, Jr.  
Circuit Court of Marshall County  
Marshall County Courthouse  
600 Seventh Street  
Moundsville, WV 26041  
***Fax (304) 845-2522***

Cherie F. Sellers